

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

CASE NO: A5020/2014

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

6 NOVEMBER 2014

FHD VAN OOSTEN

In the matter between

**DBT TECHNOLOGIES (PTY) LTD
SIBUSISO PATRICK SIBISI
ERIC D'HONDT
TRAVIS SCHMELING**

**FIRST APPELLANT
SECOND APPELLANT
THIRD APPELLANT
FOURTH APPELLANT**

And

TUBULAR CONSTRUCTION PROJECTS (PTY) LTD

RESPONDENT

J U D G M E N T

VAN OOSTEN J:

[1] This is an appeal against the judgment and order by Maleka AJ, in an opposed urgent application, on 28 November 2013. The respondent (Tubular), on 12 November 2013, launched the application against the first appellant (DBT) and the second, third and fourth appellants, in their respective capacities as chief executive officer, managing director and assistant group general counsel of DBT. The relief sought, in essence, was a declarator that DBT and the second, third and fourth

appellants were in contempt of court in non-complying with an order of this court by Du Plessis AJ, on 3 May 2013. In addition hereto an order was sought against DBT to comply with the order, and for the second, third and fourth appellants to 'forthwith cause [DBT] to comply' with the order, before close of business following the day after the date of the order, failing which certain penalties were to be imposed and, finally, that in the event of non-compliance with the order, the deputy sheriff be empowered to approve and certify the 're-measurement portion of IPC (interim payment certificate) 46 in the amount of R190 262 973.30'. Lastly, an order for costs on the punitive scale was sought.

[2] On 28 November 2013 Maleka AJ found in favour of Tubular and made the following order:

'3. Declaration order:

3.1 The First Respondent [DBT] has acted in breach of the order made by Acting Judge Du Plessis in paragraph 34.1 – 34.5 handed down on 3 May 2013.

4. The first respondent [DBT] is directed to comply with that order of Acting Judge Du Plessis within 5 days of this order.

5. The second and third respondents [the second and third appellants] are ordered and directed to ensure that DBT complies with the order of Acting Judge Du Plessis, within the period referred to in paragraph 4 of this order.

6. In the event that the first respondent [DBT] fails to comply with this order, the applicant, [Tubular] is granted leave to this Court urgently or otherwise for an order in terms of 3.1 to 3.5 of the notice of motion as far as it refers to the first to third respondents [the first to third appellants].

7. No costs ordered against the second to fourth respondents [the second to fourth appellants].

8. The fifth respondent's costs are to be paid by the first respondent [DBT] to the extent that the costs have been incurred.

9. The first respondent [DBT] is to pay the costs of this application, which costs shall include costs consequent upon the employment of two counsel.'

The order I have set out has to a certain extent been reconstructed from the typed judgment of Maleka AJ, which became necessary as the official typed order issued by the Registrar of this court is replete with errors. In argument before us counsel were *ad idem* as the terms of the order.

[3] DBT filed an application for leave to appeal against the whole of the judgment and order of Maleka AJ. Tubular filed an application in terms of rule 49(11), in terms of which it sought an order that paragraphs 3 to 6 and 9, alternatively paragraphs 3, 5 and 6 of the order not be suspended pending the decision of any appeal against that order. On 5 December 2013 Maleka AJ granted leave to appeal to this court and in addition granted leave that immediate 'effect be given' to paragraphs 3-6 of the order. The judgment of Maleka AJ in the application for leave to appeal, we were informed from the Bar, was, due to some error, not recorded and we therefore do not have the benefit of the learned judge's reasoning.

[4] DBT filed a 'notice of appeal' styled 'Appellants' amended notice of Appeal', but out of time, on 4 April 2014. A substantive application for condonation for the late filing of the notice of appeal and furnishing security for costs was filed on 20 May 2014. The application is opposed by Tubular and a full set of affidavits has been filed. In the determination of this application it is relevant to consider, on the one hand, that the delay caused in the late filing of the notice of appeal was some 2 months, and on the other, that delays occurred resulting from DBT changing its attorneys of record in January 2014 and, in addition thereto, some unexplained blunders on the part of its attorneys in only launching the application for condonation on 20 May 2013, although the absence of a notice of appeal was apparent to them as early as the beginning of February 2014. I am satisfied that the delay of 2 months had no bearing on the date of the hearing of the appeal which, in any event, would not have occurred earlier than end October 2014. In the absence of any prejudice caused to Tubular, condonation, in my view, ought to be granted. As for the costs of the application, I consider it just and equitable that each party pays its own costs in regard thereto.

[5] I interpose to comment on the notice of appeal filed by DBT. It is merely as for the grounds thereof, a copy and paste of the application for leave to appeal. The original notice of appeal was filed with the Registrar and not served on Tubular. The amended notice of appeal was thereafter properly delivered. The 'findings of facts and/or rulings of law appealed against' are enumerated in 12 numbered paragraphs, each commencing with the introductory words that the learned judge erred in the particular aspect which follows. But, seemingly absent from the notice of appeal are

the grounds on which it is alleged the learned judge erred. It accordingly fails to inform either Tubular or the court of the ambit of the appeal (see *Kilian v Geregsbode, Uitenhage* 1980 (1) SA 808 (A), which dealt with a notice of appeal in terms of the Magistrate's Court rules; Harms *Civil Procedure in the Superior Courts* B49.11). Counsel for Tubular concluded in contending that the notice of appeal for the reasons given, was a nullity. I am unable to agree. The notice does set forth the findings appealed against as well as the variation of the order sought and therefore complies with the requirements in rule 49(4). Although the rule does not in so many words require the grounds on which the appeal is founded to be specified, as much should be read into the wording of the rule in order to achieve the objectives I have alluded to. The notice of appeal however, did not include all the grounds of appeal relied on in DBT's heads of argument. Counsel for DBT sought to remedy the defects in the notice of appeal and asked for an amendment of the notice of appeal to include the grounds of appeal based on the arguments set forth in the heads of argument. I am inclined to allow the informal procedure for amendment as the grounds of appeal are dealt with not only in DBT's application for condonation, which has been in Tubular's possession since 21 May 2014, but also in the heads of argument filed on DBT's behalf. No prejudice has been alleged to exist nor was I able to find any. The appeal accordingly proceeded on all aspects raised in the heads of argument as amplified in oral argument.

[6] For a proper understanding of the contractual setting between the parties and the disputes they have become entangled in, it is necessary by way of background to refer to the salient facts of this matter. DBT and Tubular are the parties to a written sub-contract, dated 3 July 2009. In terms thereof DBT appointed Tubular as its sub-contractor to perform certain works at units 1 to 6, at Eskom's Kusile Power Station ("the sub-contract"). DBT in turn is a main sub-contractor to Alstom S&E Africa (Pty) Ltd, who is the main contractor to Eskom in respect of the works. The scope of the sub-contact involves extensive works, substantial sums of money and is of national interest. The original sub-contract price was in excess of R1,28 billion and its anticipated duration some 4 years. In 2012 certain disputes arose between the parties which were, in terms of the sub-contract, referred to a Dispute Adjudication Board (DAB) presided by Adv PMM Lane SC. One of the disputes was whether

Tubular, in terms of the sub-contract, was to be remunerated on a 'lump sum' or a 're-measurable' basis.

[7] The DAB, based on an interpretation of the sub-contract, decided in favour of Tubular that the latter applied. Both parties were dissatisfied with the DAB award and they filed, as they were contractually entitled to, notices of dissatisfaction with the award. In particular, DBT's notice of dissatisfaction is aimed at the portion of the award that determined that Tubular was entitled to be remunerated on a 're-measurable' basis. Tubular's dissatisfaction relates to a minor aspect of the award which is not relevant for present purposes. The next step, once the notices had been given, was a referral of the disputes to arbitration for determination. We have been informed from the Bar that the arbitration pre-trial proceedings have been finalised and that it has been enrolled for hearing in the near future.

[8] Yet a further dispute arose concerning the DAB award: DBT held the view that the filing of the notices of dissatisfaction suspended the DAB's award, pending the resolution thereof in the arbitration proceedings. Tubular disagreed and launched motion proceedings in this court seeking an order compelling DBT to re-measure the work performed by Tubular and to make payment of the amount found to be due, based on the contention that the DAB award was immediately enforceable. DBT opposed the application and it came up for hearing before Du Plessis AJ. The learned judge, on 5 May 2013, upheld Tubular's interpretation of the sub-contract and in consequence granted the following order:

- '1. The respondent [DBT] is ordered to forthwith give effect to the decision of the Dispute Adjudication Board handed down on 5 December 2012;
2. The respondent [DBT] is ordered to forthwith re-measure and pay the applicant's [Tubular] Interim Payment Certificate number 37 dated 25 January 2013;
3. The respondent [DBT] is ordered to forthwith re-measure and pay such further Interim Payment Certificates as the applicant [Tubular] may present from time to time in terms of the subcontract between the parties.
4. The orders in paragraphs 2 and 3 shall endure until such time, if at all, that the said decision of the Dispute Adjudication Board is revised in amicable settlement or an arbitral award.
5. The respondent shall pay interest a tempore morae on all amounts due to the applicant.

6. The respondent shall pay the applicant's costs of the application including the costs of two counsel (where applicable).'

This is the order in respect of which Tubular sought the relief in the urgent application, which is the subject matter of this appeal (the order). Maleka AJ, having considered the affidavits filed and arguments presented, came to the conclusion that although DBT had 'failed to comply' with the order, wilful disobedience had not been shown which decided the fate of the contempt of court relief sought. The learned judge declined to make an order in terms of paragraphs 2, 3 and 4 of the notice of motion. But, so the learned judge reasoned, although DBT's 'refusal' to comply with the order was not wilful, it was nevertheless a 'refusal' to comply and that Tubular, to that extent, had made out a case. Having considered what is appropriate and just in the circumstances of the case, the learned judge, on the basis of DBT's 'failure' to comply with the order, issued the declarator in the terms I have quoted above, declared that DBT 'has acted in breach of' the order. Although implicit in the judgment, no specific order dismissing the contempt relief (sought in prayer 2 of the notice of motion) was made.

[9] On appeal DBT attacks the findings of the judge a quo firstly, that DBT had acted in breach of the order, secondly, that DBT had refused to re-measure in terms of the sub-contract and, thirdly, that there was a clear indication that DBT was not willing to perform its obligations in terms of the order. In argument before this court, counsel for DBT submitted that the 'finding' by Maleka AJ that DBT had *refused* to comply with the order was wrongly made and that it should be set aside on appeal. A careful reading of the judgment of Maleka AJ reveals that the words 'refused', 'unwilling' and 'failed' in regard to DBT's non-compliance were used interchangeably. The declarator, as I have pointed out, refers to DBT being 'in breach of' the order. Whether the breach consisted of a refusal or unwillingness or a failure to obey, is neither here nor there. It is trite that an appeal lies against the substantive order made by the court a quo only and not against the reasons for judgment (per Nicholas AJA (as he then was) in *Administrator Cape and another v Ntshwaqela and others* 1990 (1) SA 705 (A) 715D). For these reasons, the contention raised by counsel for DBT cannot be entertained and is rejected.

[10] This brings me to the remaining grounds of appeal. I propose to consider first the appeal against the order of the court a quo against DBT to pay the costs of the fourth appellant. The second to fourth appellants, as I have mentioned, are respectively the chief executive officer, managing director and assistant group general counsel of DBT. The court a quo found that the fourth appellant was 'inappropriately' joined to the application and, without furnishing reasons therefore, ordered DBT, his employer, to pay his costs. In the absence of any reasons for the order I am not satisfied that the learned judge a quo exercised his discretion judicially (see *Manong & Associates v City of Cape Town* 2011 (2) SA 90 (SCA) para [92]). No justification for the order has been shown to exist. The appeal on this ground must accordingly succeed.

[11] I now turn to deal with the joinder of and order made against the second and third appellants (the appellants). The basis for their joinder, as stated in the founding papers, is that they 'have knowledge of the court order (of Du Plessis AJ) and have had such knowledge for many months'. I hardly need to state that this does not constitute a ground for the joinder of the directors of a company where relief is sought against that company. Equally odd is the contempt relief in prayer 1 of the notice of motion sought against all the respondents, therefore including the appellants. The court a quo issued the operative part of the declarator against the appellants on the basis that it was necessary 'to ensure that the order that I have made (the declarator and directives) against it, should be given effect to by its directors, at least the two directors...(the appellants)'. In this court counsel for Tubular sought to find support for the finding in the fact that a company can only act through its directors. That of course does not constitute sufficient reason for either joining the directors or granting an order against them merely to ensure compliance with the order. In the absence of any evidence showing that the appellants frustrated DBT from complying with the order, both their joinder and the order granted against them are improper and therefore ought to be set aside. As to the costs of the second, third and fourth appellants, they joined forces with DBT both in the court a quo and in this court who were all represented by one firm of attorneys and the same counsel. A separate costs order in respect of their appeal, albeit successful, in my view, is therefore not justified.

[12] Finally, I turn to the main ground of appeal which is aimed at the declarator and the directives associated with it issued by the court a quo. The order is mirror image of the order by Du Plessis AJ, except that it allowed a period of 5 days from the date of the order for compliance. At the time of Du Plessis AJ's order IPC 37 was at issue and therefore referred to in paragraph 2 of the order. In the meanwhile a number of further IPC's had been issued by Tubular and the IPC then relevant was IPC 46. As more than almost 6 months had elapsed when the urgent application was brought, the subsequent events were fully dealt with in the urgent application. The crucial issue both then and now remains whether DBT has complied with the orders. It is Tubular's version that DBT has always been and remains in contempt of the court orders and that re-measurement in terms thereof has still not occurred. DBT on the other hand, apart from attacking the propriety of the order maintains that it has in fact always complied. The compliance with the orders, so it contends, consists of DBT having started, right from the outset, soon after the order of Du Plessis AJ was issued, with the re-measurement which it is at pains to emphasise, is an on-going process. Against this background the battle raged between the parties in the urgent application, the one blaming the other for such delays in the finalisation of DBT's re-measurement as did occur. It is however, beyond dispute, at this stage, that DBT has not finalised the re-measurement and that Tubular has not been paid its dues in terms thereof.

[13] Counsel submitted that the court a quo should have confined the order to a dismissal of the application, with costs. Counsel contended that there had been compliance with the order, obviating the necessity to re-issue the order and further to add to it, as counsel referred to it, the draconian sword of authorising an urgent application to be brought in the event of further non-compliance. I am unable to agree. Assuming there to have been non-compliance with the order, to which I shall revert, the re-issue of the order, in my view, was not only proper but also necessary. By the time the urgent application was heard almost 6 months had passed and further events taken place. Counsel for Tubular referred us to an instance where this procedure was sanctioned by the Supreme Court of Appeal (see *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 65). The court, in my view, has a duty to ensure that court orders are obeyed and this is exactly what the court a quo attempted to achieve.

[14] Whether DBT has complied with the order constitutes a factual issue. It is necessary to briefly refer to the events from the date of issue of the order, which were fully dealt with in the urgent application. I propose to adopt the *Plascon Evans* approach in setting out the facts from DBT's perspective to be gleaned from its answering affidavit, which was deposed to by Ms Lindsay, an attorney in the employ of DBT as a legal adviser. She states that immediately after the issuing of the order an independent quantity surveyor, Mr Gildenhuys, of AECOM, was appointed to perform the required re-measurement process in respect of Tubular's IPC 43. Gildenhuys however, experienced a number of difficulties in performing the re-measurement: he required a baseline re-measurement protocol involving the bill of quantities, which it is stated, operates as a standard against which interim payment certificates are evaluated on a monthly basis in order to ascertain the correct re-measurement payment to be made. No baseline re-measurement protocol was in existence as the sub-contract had been implemented on a lump sum basis for the first three years of its existence. The change to a re-measurement basis was brought about by the DAB award. Gildenhuys moreover, experienced *extreme* difficulty with this *time consuming* and *very difficult* exercise. But, there it did not end: Tubular, in each of the IPC's issued since IPC 37, presented a different baseline. This necessitated a reconciliation of all the different baselines. And in doing so, compounding the difficulties, a number of anomalies were discovered, examples of which are given merely to readily illustrate the *enormous problems* in evaluating and 'trying to decipher' Tubular's interim payment claims. In addition models were required for re-measurement purposes which were only provided by Tubular in August 2013. Tubular moreover, *refused* to provide shop drawings and simply offered viewing thereof at their offices: in correspondence Tubular accused DBT of having failed to avail itself of the offer. Against this turbulent background a meeting between DBT and Tubular was arranged and held on 20 August 2013. The meeting is crucial to the issue between the parties and has regrettably and notably received scant attention in DBT's answering affidavit.

[15] The 20 August meeting is referred to in detail in Tubular's letter to DBT, dated 4 September 2013, which is attached to DBT's answering affidavit. The letter records that Gildenhuys presented his report on the re-measure and various points were raised and discussed and agreed on while certain items were referred to further

meeting between the quantity surveyors which was held the next day. A further meeting was scheduled for the next day but re-scheduled for the day thereafter. Gildenhuys however, advised through his secretary on the morning before the start thereof that there would be no meeting as he was at DBT's offices and that an interim determination would be made. Following the meeting DBT in a letter to Tubular, dated 26 August 2013, with reference to the meeting, stated: 'As you are well aware, DB Thermal is well into the process of a complete and thorough re-measurement' and provided an interim certification of IPC 43, the correctness of which was disputed by Tubular in correspondence that followed.

[16] In October 2013 DBT produced an 'estimation' in respect of IPC 43, based on Gildenhuys's 'best attempt' to make a 'fair and reasonable' certification. Tubular once again disagreed with the certification. Amounts totalling R21 028 789.43, in respect of IPC 43, were eventually paid to Tubular, which in view of the magnitude of the claim was considered minimal. In the meanwhile IPC 44 and 45 were issued. Tubular was requested regarding each of these to exclude the re-measurement which it was compelled to do merely to ensure payment of some of the amounts claimed. The amount excluded was carried over to the next IPC.

[17] The urgent application was launched as a consequence of IPC 46 having been submitted but not paid. Tubular submitted IPC 46 to DBT on 22 October 2013. The following day DBT in writing raised two queries mentioning the 'non-achievement of milestones' which Tubular immediately thereafter indicated it was prepared to concede. Apart from DBT stating that IPC 46 was 'under review', no further queries were raised. On 23 October 2013 DBT issued a re-measurement by way of a spread sheet containing a reference to all the amounts claimed by Tubular in respect of the units and next to it, in a separate column, the amounts of DBT's re-measurement. The DBT re-measurement total amount arrived at is some R4m less than the amount claimed by Tubular. Tubular was prepared to accept the lesser amount in respect of the re-measure (R221 860 935.26) as it was an interim payment, and on 9 November 2013 re-submitted for approval IPC 46 for payment of that amount. In response DBT, yet again, without furnishing reasons, demanded that the 're-measurement on all units be excluded' before payment would be made. In DBT's letter to Tubular dated 1 November 2013 it is reiterated that DBT 'will issue a final

certification to Tubular' which it is common cause has not happened. Against this background the allegation in DBT's answering affidavit firstly, that Gildenhuys 'is presently conducting the final re-measurement' and secondly, that DBT is 'currently re-measuring as it will continue to do in the future' has a hollow sound to it.

[18] The response on behalf of DBT concerning IPC 46 is instructive. In the answering affidavit it is alleged, for the first time, that the 23 October 2013 re-measurement was not final. Then follows, much in line with the reasons proffered for the initial delays in the certification, the never-ending problems which Gildenhuys allegedly encountered in his attempts to finally certify the re-measurement. I do not consider it necessary to traverse all these save to remark that there is a glaring absence of a reference thereto by DBT in response to Tubular's submission of IPC 46, which clearly was the opportune time to have done that. Irreconcilable improbabilities arise, which DBT simply failed to deal with. It is for one, stated that the 'provisional review' was simply 'to function as a starting template on which he (Gildenhuys) could conduct his reviews in respect of the re-measurement for purposes of establishing a final re-measurement account'. Assuming this to be true, I would have expected DBT to state as much in its response to Tubular's submission of IPC 46. Instead, it merely demanded exclusion of all re-measurements. Further contributing to the mystery is the question why, assuming this document to have been a working template or compiled for comparison purposes only, it was forwarded to Tubular, when it was known to all that Tubular was awaiting certification by DBT for submission of IPC 46 and eventually to obtain payment. I am unable to reconcile the re-measurement with either the events surrounding it or the nature of the document. Had the alleged problems faced Gildenhuys he, quite clearly, would not have been able to perform any re-measurement, let alone the one as detailed as he has done. I am left with the inescapable impression, having carefully considered the version of DBT, in particular the ballooned superlatives italicised above, that Tubular's view, that a front of red herrings and smokescreens was raised in an attempt to obfuscate DBT's contractual obligation, is not without merit. Such problems as there may have been surely would or could have been addressed at the 20 August meeting. Gildenhuys surprisingly, unilaterally cancelled the continuance of the meeting with a promise of performance which is difficult to reconcile with the large number of problems he allegedly faced. The baseline requirement which was

elevated in DBT's answering affidavit to the pivotal difficulty in performing the re-measurement, only featured once in the correspondence between the parties. Promises made by DBT came to nothing. DBT did perform limited interim re-measurements and one partial interim payment was made to Tubular: how this was possible in the face of the many problems that have now been brought to the fore remains unexplained. The aspects I have referred to clearly illustrate DBT's non-performance of a contractual obligation and in addition thereto, non-compliance with the court orders confirming that obligation.

[19] In terms of the sub-contact Tubular is required to submit monthly IPC's to DBT for its approval, which include the estimated contract value of the works executed at that time. DBT is then required to approve the IPC within 18 days of submission and within 5 days thereafter Tubular is to submit an invoice based on the approved statement. Payment to Tubular must be made within 63 days after the 22nd day of the month of the statement. Tubular, in both the proceedings before Du Plessis AJ and the urgent application, in essence, sought an order for specific performance of DBT's contractual obligation to approve the IPC after re-measurement. A period of almost 2 years and 3 court orders later and there has still not been compliance. DBT has not shown any defence either to the claim for specific performance or the court orders. I am satisfied that Maleka AJ correctly re-issued the order of Du Plessis AJ and that the leave granted in respect of the bringing of an urgent application in the event of further non-compliance in paragraph 6 thereof, was fully justified. It follows that the appeal, save for certain minor amendments to the order of the court a quo, in line with the findings I have already made, cannot succeed.

[20] In the result the following order is made:

1. The appeal is upheld to the following extent:
 - 1.1 Paragraphs 5 and 8 of the order of the court a quo are set aside.
 - 1.2 The words 'to the third respondent' in paragraph 6 of the order of the court a quo are deleted.
2. The appeal against the remainder of the judgment and order of the court a quo is dismissed.

3. The first appellant is ordered to pay the costs of the appeal, such costs to include the costs consequent upon the employment of two counsel.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

BA MASHILE
JUDGE OF THE HIGH COURT

I agree.

L WINDELL
JUDGE OF THE HIGH COURT

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CLIFFE DEKKER HOFMEYR
INC

DATE OF HEARING
DATE OF JUDGMENT

29 OCTOBER 2014
6 NOVEMBER 2014